No. 15416

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

VICTOR MANUEL GIL,

Appellant,

vs.

ALBERT DEL GUERCIO, as District Director of the Immigration and Naturalization Service at Los Angeles, California,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

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Statement of Pleadings and Jurisdictional Facts.

A verified complaint entitled "Complaint for Declaratory Judgment and Injunction" was filed on March 13, 1956, in the District Court for the Southern District of California by the appellant while at liberty on bond [3-8].[1] The defendant was Albert Del Guercio, appellee herein, and substituted for the originally named defendant Gordon Cornell, by stipulation on October 22, 1956 [12],

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[1]Bracketed numbers refer to pages in printed Transcript of Record unless clearly different by context.

officer in charge of the Los Angeles district of the United States Immigration and Naturalization Service.

The complaint alleged that an Order for his deportation was issued on March 11, 1955 [4] and that an actual controversy exists respecting the validity of said order and the enforcement thereof [6].

The complaint alleged that all administrative remedies has been exhausted [5]; that the entry of the order for deportation, *supra,* was not based upon reasonable, reliable, probative and/or substantial evidence [6] and that voluntary departure[2] was denied and that said denial of voluntary departure was predicated upon unreasonable, unsubstantial and unreliable evidence and was arbitrary capricious and a denial of due process of law and the rules and regulations of the immigration service [6].

Prayer of his complaint was for a judgment declaring:

1. Order of Deportation illegal and void and without force and effect; and,

2. Permanent injunction against deportation.

An Order to Show Cause was issued same day and was subsequently discharged [8].

The answer of the defendant denied that the deportation order was based upon unreasonable, unreliable and unsubstantial evidence and in violation of the Fifth Amendment of the United States Constitution and that an actual controversy existed as plaintiff alleged. An affirmative defense was set forth alleging that plaintiff was afforded a full and fair hearing [9-11].

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[2]See appendix.

In accordance with Rule 16, F.R.C.P., a pre-trial order was submitted by counsel for plaintiff and defendant and approved by the trial court [13-14]. In said pre-trial order it was stipulated that plaintiff, appellant herein, was a native and citizen of Mexico who last entered the United States about November 25, 1953, without inspection; that voluntary departure was denied, although requested; and, that the decision had determined that he was statutorily eligible for the relief of voluntary departure.

The said pre-trial order recited the issues of law to be:

1. Did plaintiff have a fair hearing?

2. Was the denial of voluntary departure an abuse of discretion?

The Honorable Wm. M. Byrne, District Judge, made, signed and filed Findings of Fact, Conclusions of Law and Judgment on November 23, 1956, wherein and whereby he found that there was no abuse of discretion in denying voluntary departure to appellant, herein, and ordered judgment in favor of defendant, appellee herein [14-18].

Appellant filed his Notice of Appeal to the United States Court of Appeals for the Ninth Circuit from said Judgment, and the whole thereof, and from the denial of relief sought on December 3, 1956 [18].

The trial court had jurisdiction by virtue of the provisions of the Administrative Procedure Act of 1946 (Sec. 10), commonly known as the A.P.A., 60 Stat. 243; Title 5, U.S.C. 1009.[3]

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[3]See appendix.

The United States Court of Appeals for the Ninth Circuit has jurisdiction by virtue of the timely filing of the Notice of Appeal [18] from said Judgment, a final judgment, 62 Stat. 929; 28 U.S.C. 1291.

Statement of the Case.

Appellant, now age 24, was born in Mexico, of which country he is a national [15]. He has been a continuous resident of the United States, particularly the Los Angeles area, since November 25, 1953 [5]. He was arrested under an immigration service warrant on January 26, 1955, charged with entering this country without inspection in violation of 8 U.S.C. 1251(a)(2);[4] 1952 Immigration Act, Section 241(a)(2).

On February 24, 1955, at the immigration service hearing on the warrant, appellant admitted that he had last entered without inspection and his counsel so stipulated [Tr. of Hearing, p. 2]. Appellant admitted a prior illegal entry in October, 1953, and that he was granted immediate voluntary departure without the necessity of a hearing. Testified that he had never been arrested in Mexico or in the United States, save the two on immigration, *supra* [Tr. of Hearing, p. 4].

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[4]8 U.S.C.A. 1251 Act of 1952, 66 Stat. 204:

"(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) . . .

(2) entered the United States without inspection . . ."

Prior to commencement of and during the hearing, appellant, through his counsel, applied for voluntary departure.[5] He furnished a Los Angeles Police clearance showing no arrests and several character letters of recommendation [Tr. of Hearing, p. 7].

During the deportation hearing, the Special Inquiry Officer asked the following:

> "Q. The record in your case shows that you were brought to this office on January 26, 1955, and you refused to make a statement at that time. Have you any comment to make on that? A. I had been advised by my attorney not to sign or say anything *until I saw him.*" (Emphasis supplied.) [Tr. of Hearing, p. 5.]

It does not appear in the transcript of the administrative hearing, but at said hearing, probably when we were "off record," counsel for appellant fully and completely advised the special inquiry officer that he, as attorney for appellant's employer, was present at said place of appellant's employment when the immigration officers came in and specifically asked for appellant by name. It was then, and special inquiry officer was so apprised, that counsel advised appellant not to talk or sign anything until he had a chance to talk to him, and this was said in presence of arresting immigrating officers as they were preparing to leave with appellant in their custody.

The decision of the Special Inquiry Officer on page 2, thereof, acknowledged that appellant had established statu-

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[5]See appendix.

tory eligibility for the privilege of voluntary departure. It further states that on appellant's apprehension he refused to make a statement or sign any papers on the advice of counsel AND, quoting:

> *"He was also offered the voluntary departure privilege at that time and refused it."* (Emphasis supplied.) [Decision of Hearing, p. 2.]

There is absolutely nothing in record to support said statement. It is unwarranted. The decision, *supra,* denied the request for voluntary.

If the appellant was worthy of the privilege of voluntary departure on his apprehension, he was worthy of it at the hearing. There is not one iota of evidence against appellant, unless it is construed that he offended anyone by asking for his attorney.

To deny voluntary departure at the hearing because alien refused to sign any papers or talk until he saw his attorney is a gross abuse of discretion.[6] It is particularly pointed out that appellant *did not refuse to talk or sign anything tendered him, but merely declined until he saw his attorney.* The query is primarily whether the denial of effective right to counsel is a violation of the Fifth Amendment to the Constitution and the rules and regulations of the agency, *infra.*

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[6]8 U.S.C.A. 1252(b)(2) ". . . The alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;".

Appellant alleged in his complaint that by virtue of the Order of Deportation issued on March 11, 1955 [6], he was about to be taken into custody and deprived of his liberty in violation of due process of law [5] and that an actual controversy exists between appellant and appellee with respect to the validity of said order and the enforcement thereof [6]. He alleged that all administrative remedies had been exhausted [5]. The prayer of his complaint was for a declaratory judgment that the said order was illegal and void and without force and effect and for a permanent injunction against deportation [7] alleging that he had no plain, speedy or adequate remedy to prevent his summary removal from the United States [7-8].

Appellant appealed to the Board of Immigration Appeals from the decision and order of the Special Inquiry Officer and the appeal was dismissed (Decision of Board of Immigration Appeals). The trial court's Finding No. III is erroneous when it states that no appeal was ever taken from said order of deportation [16]. It is true that at all times appellant has admitted entry without inspection, and while the paradox is present that we appealed from all of the Order of the Special Inquiry Officer, we direct this Honorable Court's attention to the flagrant attempt to deny alien right to effective counsel and to use the alien's effort to secure legal advice as a basis for denying voluntary departure.

The trial court, we respectfully submit, erred in its conclusion of law, based upon the findings and the record,

that there was no abuse of discretion in denying voluntary departure. We did not seek to have the trial court substitute its judgment for that of the agency; we did, however, contend that the administrative agency abused its discretion, and respectfully submit that the judgment of the lower court is incorrect and that the administrative agency did abuse its discretion in denying voluntary departure under the unique circumstances of this case.

Specifications of Error.

The appellant makes the following specifications of error of the District Court.

I.

The District Court erred in making said Judgment.

II.

That Finding No. III is in error insofar as it declares that no appeal was taken from the order of deportation and that said order of deportation became final. The decision of the Board of Immigration Appeals in its opening sentence declares that the case is before them on appeal from a decision of a special inquiry officer directing the respondent's deportation. The portion of said finding is contrary to the record. It constitutes a denial of due process and a fair hearing.

III.

That Conclusion of Law No. II is error because there was no due process or fair hearing when the special inquiry officer predicated his decision upon a denial of effective assistance of counsel, all in violation of the Fifth Amendment and the statutes enacted by Congress and the rules and regulations of the agency.

IV.

That Conclusion No. III is in error and unsupported by the record when it concludes that there was no abuse of discretion in denial of voluntary departure to appellant.

V.

That Conclusion No. IV is error when it concludes that the order of deportation is valid and appellant is deportable pursuant to said order because it is based upon an erroneous finding, *supra,* unsupported by the record, and contrary to law.

VI.

That the judgment is improper because:

1. No. 1, thereof, is unsupported by a finding of fact or conclusion of law that is supported by the record; and,

2. No. 2, thereof, is improper because it is based upon a finding and conclusion unsupported by the record.

ARGUMENT.

POINT I.

Administrative Agency Hearing Unfair When Special Inquiry Officer's Decision Arbitrarily Assumes as Ground for Denial of Discretionary Relief Matter Not of Record in Deportation Hearing.

Denial of Effective Service of Counsel Is a Denial of Right of Counsel Guaranteed by Constitution, Congress and Administrative Regulations.

Right of Counsel Means Effective Representation at All Stages of the Proceedings Including Advice on Apprehension, Not Mere Right to Be Present at Deportation Hearing.

It Is an Arbitrary Denial of Fair Hearing and a Denial of Due Process to Deny Alien Voluntary Departure Who, on Advice of Counsel, Refused to Talk or Sign Anything on Apprehension Until He Saw His Counsel.

Appellant Applied for Discretionary Relief of Voluntary Departure Prior to and During the Hearing, and Subsequent to Issuance of Warrant of Arrest as Rules of Agency Provide.

The Constitution of the United States, Amendment VI, provides for right of counsel in criminal matters and over the years this has grown to include immigration proceedings, theoretically civil in nature.

The 1952 Immigration and Naturalization Act, Section 1252(b)(2), provides that "(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose."

The immigration agency regulations, 8 C.F.R. 244.14 (b), provides that the alien shall be advised of his right to be represented by counsel and that this must be done upon service of the warrant of arrest.[7]

Agency regulations provide that at any time subsequent to the issuance of warrant of arrest and prior to the commencement of the hearing, alien may apply for voluntary departure (8 C.F.R. 11).[8]

There can be no question of the right to effective counsel at all stages of the immigration proceedings. The rudimentary demands of justice cannot be circumvented by allowing counsel at a hearing, but intimidating the use of counsel by denying discretionary relief merely because appellant followed advice of counsel not to talk or sign anything when he was arrested at his place of employment.

It is a travesty on common sense and the elemental principles of justice to place any credence in the "reason" given for denial of the relief, namely, that appellant had given no reason why he could not accept the offer of voluntary departure at the time of his apprehension. There is not an iota of evidence in the record that such was proffered to appellant and that he refused same. The truth and exact fact as shown by the Transcript of the Hearing is that appellant applied for the relief prior to and during the hearing [Tr. of Hearing, p. 6].

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[7]See appendix.

[8]See appendix.

The agency decision on page 2, thereof, makes the following statement:

> "An alien who once was granted voluntary privilege and who again is found here illegally does not merit a second chance for such departure in the absence of strong extenuating circumstance (I. D. No. 352)."

That is a quote from a decision of the Board of Immigration Appeals in the Matter of M, 4 I & N Decisions, page 626. In that case the Board further pointed out that ". . . We wish to caution that what we say here is not to be taken as an invariable rule, but that in each case the decision ultimately must be predicated upon the merits or demerits of the case . . ." They reversed the special inquiry officer's decision in that case and granted voluntary departure to the alien involved. In our case the decision of the Board of Immigration Appeals contains the following:

> "The remaining matter is whether voluntary departure should be granted to the respondent. He was granted voluntary departure on November 21, 1953 and his last entry occurred about four days later. He has been in the United States for a period of less than five years and former 8 CFR 242.61(f)(2) (now 8 CFR 242.21(a)) specifically provides that no appeal shall lie to this Board, in such cases, from an order of a special inquiry officer denying an application for voluntary departure as a matter of discretion. Hence, *we are not in a position to grant voluntary departure on appeal even if we were inclined to do so.*" (Emphasis supplied.) (Board of Immigration Appeals Decision, pp. 1, 2.)

To attempt to force an alien to act without advice of counsel is like forcing one charged with an offense to trial before counsel can adequately prepare the case. (*Cf. White v. Regan,* 324 U. S. 760.)

The relationship of attorney and client is one of trust and confidence. Fidelity to a client requires that the attorney should protect and maintain client's just rights. Appellant's counsel was present at his place of employment when the immigration officers came in and asked for him by name. It does not appear in the record but that was when counsel advised appellant not to sign anything or talk until he could see him. That is what the appellant did. He then followed the law by making request prior to and during the hearing for the discretionary relief.

While the Congress imposed in the Attorney General the discretion to grant or deny the relief, and the Attorney General then, by his regulations, permitted a subordinate to make such determination for him without right of appeal, the salient factor is posed for consideration: can one subordinate offer voluntary departure, and another subordinate deny same when there are no change of circumstances, save and except the exercise of the fundamental right to counsel. Appellant says no.

As is so pungently expressed in *Boyd v. United States,* 116 U. S. 616, 636, "Under our system of government there should be no way to subject the life and freedom of one individual to the 'unfettered' or, more particularly, the 'arbitrary power of another.' "

POINT II.

Appellant Concedes That a Denial of a Fair Hearing Cannot Be Established by Proving Agency Decision Wrong.

Appellant Concedes That Trial Court Will Not Substitute Its Judgment of Record for That of Agency. We Acknowledge That Mere Error in Agency Decision Is Insufficient for Legal Relief.

Appellant Strongly Urges That Trial Court's Findings, Conclusion and Judgment Are in Error Because They Are Unsupported by the Record of the Agency Which Appellant Forcefully Contends Show an Arbitrary Abuse of Power and a Denial of Constitutional, Congressional and Agency Regulations Rights of Alien Appellant.

Appellant recognizes, accepts and concedes that the law is well established that a denial of a fair hearing cannot be established by proving that agency decision was wrong or that a court will substitute its judgment in a matter of discretion for that of the agency when Congress has imposed the right of discretion in the agency.

Tisi v. Tod, 264 U. S. 131;

Universal Camera Corp. v. N. L. R. B., 340 U. S. 474, 488;

Taranto v. Hoff, 88 F. 2d 85 (9th Cir.);

United States v. Neely, 202 F. 2d 289.

We recognize that it was the duty of the trial court to make and base his decision on the record made in the administrative proceedings, since there was no trial *de novo.*

Our complain did not ask the trial court to substitute its discretion for that of the administrative

agency. What we did seek, and what the agency record on file in the trial court proved, was a judgment that the special inquiry officer acted arbitrarily and in so doing rendered the hearing unfair, thus voiding the decision of the agency.

As we pointed out, *supra,* the lower court's Finding No. 111 [16] is incorrect insofar as it declares that no appeal was ever taken from said order of departure and said order became final. The true record before the trial court showed that the Board of Immigration Appeals Decision, page 1, says: "This case is before us on appeal from a decision of a special inquiry officer directing the respondent's deportation."

We submit that Conclusion of Law II [16] is improper because the transcript of the hearing shows that the appellant was penalized because he exercised his right to counsel, *supra.*

We submit that Conclusion IV [16] is improper because the transcript of the hearing conclusively shows that the officer based his decision on discretionary relief on matter not of record and upon a denial of right of counsel to act effectively, *supra.*

The Judgment rendered by the lower court is incorrect and should be reversed because it is based upon findings and conclusions not supported by the record.

The Judgment of the lower court is error and should be reversed.

Respectfully submitted,

JOHN P. TOBIN,

Attorney for Appellant.

APPENDIX.

Section 10 of the Administrative Procedure Act of 1946.

(3) "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

"(a) Right of Review.—Any person suffering legal wrong because of any agency action are adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

"(b) Form and Venue of Action.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

"(c) Reviewable Acts.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action.

"(e) Scope of Review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitu-

tional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (a) compel agency action unlawfully withheld or unreasonably delayed; and (b) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole proceeding or such portions thereof as may be cited by any party, and due accounts shall be taken of the rule of prejudicial error." 60 Stat. 243, 5 U. S. C. 1009.

Immigration & Naturalization Act of 1952—Section 244(e).

8 U.S.C. 1254(e), 66 Stat. 214.

". . .

(e) The Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraphs (4)-(7), (11), (12), (14), (17) or (18) of Section 1251 (a) of this Title (and also any alien within the purview of such paragraphs if he is also within the provisions of paragraph (4) or (5) of subsection (a) of this section), to

depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this section."

8 U.S.C.A. 1252(b)(2):

"The alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;—."

8 C.F.R. 244.11:

"The alien, if he believes that he is eligible for voluntary departure under section 244(e) of the act, may, at any time subsequent to the issuance of a warrant of arrest and prior to the commencement of the hearing, apply therefor. . . ."

8 C.F.R. 244.14(b):

"Upon service of the warrant of arrest, the alien shall be advised of his right to representation by counsel, at no expense to the Government, at the hearing to be held under the warrant of arrest. . . ."

8 C.F.R. 242.53:

"(a) . . .

(b) The special inquiry officer shall conduct a fair and impartial hearing. No decision of deportability shall be valid unless based upon, reasonable, substantial and probative evidence. . . .

(c) Special inquiry officers; specific duties. . . . 5. present the evidence . . . as to (I) . . . (IV) factors bearing upon the respondent's eligibility for discretionary relief if application therefor has been made (V). . . ."

8 C.F.R. 242.54:

"(d) Except in the case of an alien who is prima facie deportable under section 242(f) of the act, at any time during the hearing the respondent may apply for suspension of deportation on Form I-256A, for voluntary departure under section 244 of the act, or for both voluntary departure and pre-examination."